(2)

No. 06-1339

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IN THE

Supreme Court of the United States

YONG-QIAN SUN,

Petitioner,

v.

THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ILLINOIS; RICHARD HERMAN; DAVID E. DANIEL; ROBERT AVERBACK; JOHN H. WEAVER; IAN M. ROBERTSON; and JOSEPH E. GREENE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

Brief For Respondents In Opposition To Petition

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QUESTION PRESENTED

Is the Petitioner, whose initial unsuccessful application for tenure was re-evaluated and rejected on five separate occasions following independent reviews at the departmental, college, and campus levels at the University of Illinois - reviews which were specifically alert to and mindful of allegations of impropriety in the initial evaluation - nevertheless entitled to claim that alleged animus against him in the original superseded determination somehow influenced his unsuccessful application for tenure?

Was it error for the Seventh Circuit to affirm the holding of Judge McCuskey that the Petitioner's claims against the Board of Trustees should be considered on the merits?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption.

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INTRODUCTION

Petitioner presents no compelling reason for his Petition for a Writ of *Certiorari* ("Petition") to be granted. *See* Sup. Ct. R. 10. Petitioner fails to demonstrate that the Seventh Circuit's January 16, 2007 Order ("Order") is in conflict with a decision of this Court or another Court of Appeals, or that the Seventh Circuit decided an important federal question that has not already been settled by this Court. *See id.* at 10(a)-(c). The Petition should therefore be denied.

SUPPLEMENT TO PETITIONER'S STATEMENT OF THE CASE

I. Background

The Department of Materials Science and Engineering, a department in the College of Engineering at the University of Illinois, is one of the top departments in one of the top colleges of engineering in the United States. In the Summer and Fall of 2002, the Petitioner was considered for tenure in that department. (Pet. A77). On October 2, 2002, the tenured members of the department, voting by secret ballot, recommended that the Petitioner not receive tenure. (Pet. A81). Petitioner's appeal resulted in a second departmental vote on October 30, 2002, recommending again against tenure (although this vote was 9 - 9, anything more than one or two negative votes is considered to be fatal to the applicant's hopes for obtaining tenure). (Pet. A81 - A82).

Based upon that negative recommendation of the faculty, Department Head John Weaver recommended to the Dean of the College and the Provost of the University, that the application for tenure be denied.

Petitioner appealed the result, alleging that bias by Weaver had unfairly influenced the decision, and asserted other irregularities as well. (Pet. A83). Following an internal investigation, the University determined that there was a possibility that the application of the Petitioner was not fairly considered. As a consequence, his application was reconsidered at all levels. Pet. A84 - A86). At the time of the reconsideration, John Weaver was no longer the department head, and did not participate in or vote on the reconsideration of the Petitioner's application. (Pet. A84).

In July, 2003, the department (minus Weaver) voted following a renewed discussion, again rejecting the Petitioner. (Pet. A86). Ian Robertson, the new department head, recommended against tenure. (Pet. A86). The reasons given by Robertson, in addition to the negative vote of the faculty, were stated in his report and were essentially identical to the criticisms which had been given to the Petitioner in his performance evaluation in 2001, a year before his tenure application. It was Professor Robertson's opinion that the shortcomings which had been noted the previous year had not been remedied. (Pet. A86 - A87).

Upon receipt of a negative recommendation from Robertson, David Daniel, Dean of the College of Engineering, submitted the Petitioner's dossier to the College Promotion and Tenure Committee for an independent review of the merits of his application. (Pet. A87). The College Promotion and Tenure Committee determined that the department's recommendation was consistent with prior determinations by the same department. (Pet. A87 - A88). Dean Daniel conducted yet another independent evaluation of the Petitioner's dossier, and also determined it was insufficient to merit tenure at this prestigious department. (Pet. A88 - A89).

Richard Herman, Chancellor of the University, conducted a final independent evaluation of the dossier; he formed an independent ad hoc committee at the college level, membership of which was approved by the Petitioner, to review the dossier yet again. (Pet. A89). This committee likewise recommended against tenure. (Pet. A89 - A90). The Chancellor, relying on the committee's recommendation, denied tenure to the Petitioner. (Pet. A90).

The reconsiderations of the Petitioner's tenure application at the departmental level (twice), the college level (twice), and the campus level (once) were all taken with a view to ensuring that no bias of any individual crept into the determination. Each of these independent evaluations recommended against tenure.

II. Default Judgment

In the Court's April 6, 2005 Order following the second motion to compel compliance, Judge Bernthal indicated that the Defendants faced the possibility of a default if they did not "participate in the discovery process." Subsequently, the court entered a default. It was not the case, however, that Respondents had not participated in the discovery process. At the time the default was entered, the following discovery compliance had been provided:

Averback	Answers to Interrogatories
Board of Trustees	Response to Request to Produce
Daniel	Response to Request to Produce
Green	Response to Request to Produce
Herman	Answers to Interrogatories
	Response to Request to Produce (except for curriculum vitae)
Robertson	Answers to Interrogatories

	Response to Request to Produce
Weaver	Answers to Interrogatories
	Response to Request to Produce

Jointly, the Defendants had produced over 2,700 pages of documents and had answered four of the seven sets of Interrogatories propounded.

Thus, although the discovery was not complete at the time that Judge McCuskey entered the default, there had been substantial compliance with the numerous discovery requests which had been sent to the Defendants. It was in light of that compliance that the Seventh Circuit noted in its decision that it had been an abuse of Judge McCuskey's discretion to enter the default judgment rather than imposing further sanctions.

III. Departmental Promotion and Tenure Committee

The Petitioner has asserted that the Departmental Promotion and Tenure Committee routinely voted to approve white applicants for tenure, and voted against the only Chinese applicant. (Pet. 3). This statement, while true as far as it goes, is quite misleading.

First, it should be noted that only a single Chinese applicant for tenure was considered by the committee prior to 2001, and that applicant ultimately received tenure from the University. Moreover, for most of the history of the department, the faculty recommendations on tenure were made by the Promotion and Tenure Committee, which consisted of four faculty members who evaluated the tenure applicants and made their recommendations to the department head. (Pet. A34). This was changed in 2001 by John Weaver, who required a vote of the tenured faculty of the entire department, 18 or 19 in all. (Pet. A34). The Petitioner was only the second tenure

applicant to be considered under the new vote, and only the first applicant of Chinese origin. (Pet. A34).

It was for these reasons that the circuit and appellate courts determined that there was no permissible inference to be drawn from prior faculty votes. (Pet. A57, A97).

It should also be noted that since the Petitioner's application, there have been two additional faculty members of Chinese origin who have been considered for tenure. Both applicants have received tenure.

IV. Joseph Greene

Joseph Greene was 1 of 18 voting faculty members in the department. He participated in faculty discussions and had 1 of 18 votes on each occasion that the Petitioner's application was considered at the departmental level. Greene had no input into the independent considerations at either the college or the campus level, and there is no evidence that Greene's opinion was even known to the individuals involved in those decisions.

V. External Evaluators

The external evaluators were chosen by Robert Averback; in the course of the internal review which determined that there might have been some unfairness in the initial application process, that same committee specifically found that there was no impropriety in the selection of the external evaluators. (Pet. A78, A85).

VI. Inaccuracies in Petitioner's Dossier

Petitioner's assertion (Pet. 6) that "20 some research publications had been deleted from his promotion dossier" is

inaccurate. The dossier inadvertently omitted conference proceedings in which the Petitioner was involved, not research publications. Conference proceedings are not peer reviewed and are generally considered to be of no significance in evaluation of a dossier. Long before the Petitioner's candidacy, the department was on record (in evaluation of another tenure candidate) as stating, "Conference proceedings . . . are not rigorously refereed nor extensively read [and] count little (or even negatively) towards scientific and intellectual progress." This very point was commented upon to the same effect in *Sinha v. Board of Trustees of the University of Illinois*, No. 98 C 7275, 2001 WL 92178 at *3 (N.D. Il. 2001), where the Plaintiff in that case was advised, "I would like to point out to you that conference presentations . . . are not counted in any performance/tenure/promotion evaluation."

REASONS FOR DENYING THE PETITION

I. Most courts of appeal are not in genuine conflict on the issue of subordinate bias liability; in any event, this case is not a proper vehicle for considering that issue because resolution of that issue would not alter the outcome.

Petitioner contends that there is a conflict among the courts of appeals concerning the appropriate standard for subordinate bias liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. Although there is a circuit conflict on that issue, that conflict is not as extensive as Petitioner asserts. In any event, whether the record is evaluated under the legal analysis applied by the district court and the court of appeals, or under the alternative analysis from other circuits cited in the petition, the undisputed material facts do not permit a finding of unlawful employment discrimination. Accordingly, this case does not present a vehicle for

considering the legal question posed in the petition, since resolution of that issue would not alter the outcome.

Under Title VII, it is unlawful for an employer, *inter alia*, to "discharge any individual ... because of such individual's race." 42 U.S.C. 20003-2(a)(1). All courts of appeal to have considered the issue have held that an employer can be liable under Title VII based on the alleged bias of a subordinate employee. In determining whether an employer should be held liable on a theory of subordinate bias, most courts of appeal, as did the court here, have focused on the causal connection between the alleged bias and the adverse employment action. *See Collins v. New York City Transit Authority*, 305 F.3d 113, 119-20 (2d Cir. 2002) (holding that the plaintiff failed to establish a *prima facie* case of race discrimination, where he offered insufficient evidence of "causation linking" subordinate's discriminatory animus to decision to terminate by "independent, neutral, and unbiased adjudicator"); *Russel v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (5th Cir. 2000) (stating that the court "look[s] to who actually made the decision or caused the decision to be made, not simply to who officially made the decision.); *Wilson v. Stoh Cos.*, 952 F.2d 942, 946 (6th Cir. 1992) (stating that "[t]he determinative question is whether [the plaintiff] has submitted evidence that [the subordinate employee's] racial animus was a cause of the termination"); *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge"); *DeHorney v. Bank of Am. Nat'l Trust & Savs. Ass'n*, 879 F.2d 459, 467 (9th Cir.1989) (holding that the plaintiff had failed to make out a prima facie case of race discrimination, when there was no evidence to establish a nexus between the subordinate's racial slur and the superior's decision to terminate); *E.E.O.C. v. BCI Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006) (stating that the issue in a

subordinate bias claim is "whether the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."); *Stimpson v. City of Tusculoosa*, 186 F.3d 1328, 1331 (11th Cir. 1999) (noting that "the plaintiff must prove that the discriminatory animus behind the recommendation ... was an actual cause of the other party's decision to terminate the employee"), *cert denied*, 529 U.S. 1053 (2000).

Although those courts of appeal have phrased the relevant inquiry in various ways, the thrust of the inquiry in every case is whether there was a causal connection between the alleged bias and the adverse employment action.

Petitioner contends that the courts of appeal are "divided in two groups" on the standard for subordinate bias liability, and refers to them as the "influence group" and the "cause group." Pet. 15. Petitioner places the Second, Third, Fifth, and Ninth Circuits in the "influence group,"and the Fourth, Seventh and Eleventh Circuits in the "cause group." Pet. 15, 17-18. However, those courts do not appear to be in genuine conflict with each other because the slightly different formulations used by those courts would not necessarily lead to different results in any given case. Indeed, many of those courts have used different formulations interchangeably – even in the course of a single opinion. *See e.g. Russell*, 235 F.3d at 227 (framing the inquiry as whether the subordinate "possessed leverage, or exerted influence, over the titular decisionmaker," but "look[ing] to who actually made the decision or caused the decision to be made"); *Shager*, 913 F.2d 405 (asserting that the relevant inquiry was whether there was a "causal link between [the subordinate's] prejudice and [the] discharge," but proceeding to assess whether the adverse employment action was "tainted" or "influenced" by the subordinate's prejudice).

The Petitioner's grouping of the Fourth, Seventh and Eleventh circuits in a single group is not accurate; indeed, in *Lust v. Sealy, Inc.*, 383 F.3d 580, 584 (7th Cir. 2004), the court expressly rejected the Fourth Circuit's approach in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) as "inconsistent with the normal analysis of causal issues in tort litigation." The Tenth Circuit has also expressly rejected *Hill. BCI Coca-Cola Bottling Co.*, 450 F.3d at 487. Indeed, it appears that a majority of the courts of appeal conflict with the Fourth Circuit's decision in *Hill.* See, e.g., *Hill*, 354 F.3d at 303 (Michael, J., dissenting) (citing cases from different circuits in opposition).

To the extent that *Hill* is clearly at odds with the other circuits on this issue, it would impose a higher duty on the Petitioner than does the Seventh Circuit, or indeed any of the other circuits on this issue. This case is thus not a proper vehicle for resolving that conflict, because it would not be outcome determinative.

Here, as the district court and the court of appeals noted, "the final decision in this case was made by [Provost Richard] Herman, after multiple layers of review, including the review by the ad hoc committee." Pet. A59, A98. Accordingly, the district court and the court of appeals found, "the numerous levels of review, particularly those conducted by independent and University-wide committees broke any connection between [Joseph] Greene's possible discriminatory motive and the ultimate decision." Pet. A98-A99. The district court and the court of appeals relied on the court of appeals holding that "when the causal relationship between the subordinate's illicit motive and the employer's ultimate decision is broken, and the ultimate decision is clearly made on an independent and a legally permissive basis, the bias of the subordinate is not relevant." Pet. A60, A98 *citing Willis v. Marion County*

Auditor's Office, 118 F.2d 542, 547 (7th Cir. 1997). Whether the record is evaluated under the legal analysis applied by the district court and the court of appeals, or under the alternative analysis from other circuits cited in the petition, the undisputed material facts do not permit a finding of unlawful employment discrimination. *See, e.g., Collins*, 305 F.3d at 119-20 (2d Cir. 2002) (holding that the plaintiff failed to establish a *prima facie* case of race discrimination, where he offered insufficient evidence of "causation linking" subordinate's discriminatory animus to decision to terminate by "independent, neutral, and unbiased adjudicator"); *Long v. Eastfield Coll.*, 88 F.3d 300, 306-07 (5th Cir. 1996) (noting that, if final decisionmaker based decision on independent investigation, causal link between subordinate's retaliatory motive and plaintiff's termination would be broken); *Vasquez v. County of Los Angeles*, 349 F.3d 634, 640, n. 9 (9th Cir 2003) (finding that the plaintiff had not shown the necessary nexus because decisionmaker conducted her own thorough investigation, citing *Willis*, 118 F.2d 542, 547 and *Long*, 88 F.3d at 306-07). Thus, under any standard, the Petitioner cannot prevail.

II. The Seventh Circuit's Decision is not in Conflict with *Price Waterhouse v. Hopkins*.

Petitioner correctly notes (Pet. 18) that the court did not make reference to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); however, the court did reference and distinguish two other cases relied on by Petitioner, *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) and *Russell v. Bd. of Trs. Of Univ. of Ill. at Chicago;* 243 F.3d 336 (7th Cir. 2001), and the court's analysis regarding these two cases is equally applicable to *Price Waterhouse*.

As with *Roebuck* and *Russell*, Petitioner's reliance on *Price Waterhouse* is misplaced. In *Price Waterhouse*, the

partnership solicited evaluations from all the firm's partners, some of the partners' comments were the product of sexual stereotyping, and the Policy Board "*relied very heavily*" on such evaluations in making its decision. 490 U.S. at 256 (emphasis added). "By contrast, in [Petitioner's] case, subsequent reviewing committees had no report from the [Promotion and Tenure Committee] that could have tainted their reviews or ultimate decisions" (Pet. A99), and, indeed reviewed the Petitioner's case with the specific intent of conducting a *de novo* review in order to eliminate any alleged bias in the initial evaluation of Petitioner's case.

III. The Seventh Circuit Decision does not Create a "Conflict with the Law Requiring that Internal Administrative Remedies be Exhausted."

In this case, Petitioner did not suffer an "adverse employment action" until he pursued and was granted his appeal, received numerous independent reconsiderations of his application, received a final decision from Provost Herman regarding his application for tenure. Petitioner argues that the court of appeals' decision "conflicts" with this requirement because by pursuing his appeal, he established multiple layers of review; thereby, ensuring that Provost Herman was insulated from Greene's alleged bias. (Pet. 4 - 6). Petitioner misconstrues the court of appeals' decision. Contrary to Petitioner's contention, the court of appeals did not hold that employers may evade liability for Title VII claims *simply* by establishing multiple layers of review for employment decisions.. The court recognized, as it has in the past, and as other courts of appeal have done, that an employer can be liable under Title VII based on the alleged bias of a subordinate employee, if the plaintiff can present sufficient evidence of a causal relationship between the alleged bias and the adverse employment action. This Petitioner failed to do so. The court of appeals rightly found

that the "the numerous levels of reviews, particularly those conducted by independent and University-wide committees broke any connection between Greene's possible discriminatory motive and the ultimate decision." Pet. A98-A99.

IV. The Seventh Circuit's Decision does not Create a Conflict with Other Circuits Over the Meaning of Good Cause for Vacating a Default Judgment.

Contrary to Petitioner's assertion, the court of appeals did not consider the meaning of "good cause" for vacating a default judgment. Rather, it decided "the antecedent issue of whether the entry of default was proper in the first place", and concluded that "default judgment was an unduly harsh sanction in this case." Pet. A94. The court did not affirm the district court's decision to vacate the default because it found that Respondents had shown good cause; it did not address that issue. Rather, it affirmed the district court's decision because it found that the district court had "improvidently" granted entry of default judgment in the first place: "[I]nstead of entering a default, punishing the defendants and giving the plaintiff a windfall, the district court should have imposed increased monetary sanctions against the attorneys who had caused the discovery delays." Pet. A95.

V. The Seventh Circuit's Decision is not in Conflict with this Court's Decision in National Hockey League.

In *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976), the district court dismissed the action for the hockey club's failure to answer written interrogatories. The Court of Appeals for the Third Circuit reversed, and this Court reversed the judgment of the Court of

Appeals and restored the District Court's ruling. 427 U.S. at 639, 643.

As this Court noted, "[t]he question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.* at 642. This Court noted that dismissal is an "extreme" sanction, and concluded that the district judge did not abuse his discretion in finding that dismissal was appropriate under the circumstances of the case. *Id.* at 643.

In this case, the district court vacated its entry of default, and the court of appeals affirmed, finding that the district judge did not abuse his discretion in doing so. The court of appeals concluded "that default judgment was an unduly harsh sanction in this case", and believed that the district judge "likely realized [that] ... this case [did] not represent one of those rare situations in which entry of default is appropriate." Pet. A94 - A95.

The fact that in *National Hockey League*, the district court found that dismissal was an appropriate sanction, and that this Court found that the district court did not abuse its discretion, does not mean that in this case, the district court abused its discretion in finding differently. The court of appeals' decision in this case does not conflict with *National Hockey League*.

VI. The Seventh Circuit has not Applied a More Lenient Standard Towards Defendants than Plaintiffs in Rendering Default or Dismissal as a Discovery Sanction.

Petitioner cites *Williams v. Chicago Bd. of Ed.*, 155

F.3d 853 (7th Cir. 1998) and *In re: Thomas Consolidates Industries, Inc.*, 456 F.3d 719 (7th Cir. 2006) as examples of the court of appeals applying a more strict standard to plaintiffs than that applied to the Respondents in this case. This is a misinterpretation of those holdings.

Williams involved dismissal of a case *sua sponte* for want of prosecution. 155 F.3d at 856-57. *Williams* is also distinguishable because, contrary to Petitioner's representation, it involved significantly more than violation of a discovery order:

> Williams' attorneys clearly tested the judge's patience. Their lack of respect for the rules of litigation and the court's scheduled deadlines was manifest from the case's inception, beginning with their failure to serve the defendants in a timely fashion and their utter disregard for Rule 26's mandatory disclosures. And there was no improvement as the case progressed. Among other things, Williams' counsel missed the deadline to respond to the Board's motion to dismiss; failed to respond to the Board's basic discovery requests and then, after being ordered to respond by a certain date, missed that deadline as well; failed to submit a draft pretrial order and proposed jury instructions to the defendants by the court-scheduled deadline; and then neglected even to appear in court for the scheduled hearing to submit the pretrial order and jury instructions that should have been finalized by that date.

Id. at 858.

In re: Thomas Consolidated Industries, Inc. also involved more than "violating one discovery order." Counsel also lied about when and how he tendered the discovery responses, and repeated the same non-responsive, inadequate answers that the bankruptcy court expressly warned him were unacceptable. The court of appeals found counsel's conduct to demonstrate the bad faith finding that justified dismissal. 456 F.3d at 726.

Williams and *In re: Thomas Consolidated Industries, Inc.* are not examples of a more strict standard applied to plaintiffs; rather, the cases are examples of the broad discretion afforded to district court judges to determine what discovery sanctions are appropriate in any given case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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